B. Petitioners' dissatisfaction with the result below is not a compelling reason to disturb the court of appeals' ruling.

In reality, Petitioners' complaint lies not with the way in which the court below applied the *Strickland* standard but rather with Petitioners' disagreement with the conclusion reached by the court in doing so. Contrary to Petitioners' claim, the court of appeals did not depart from the standards enunciated in *Strickland* when it concluded that Respondent was prejudiced by his trial counsel's deficient performance during the sentencing phase of his trial. The standard Petitioner asks this Court to employ is, essentially, an outcome-determinative test applied to the specific judge in Respondent's case—a test *Strickland* expressly rejected. *See Strickland*, 466 U.S. at 693-94.

Two compelling facts undermine Petitioners' factual assumptions and detract from their legal conclusions. First, the trial judge "was a heavy user of marijuana at the time" of the sentencing, "a fact that the State conceded in the federal habeas proceedings before the district court in this case." *Summerlin I*, 341 F.3d at 1089; *see also id.* n.1. Certainly the Court in *Strickland* cannot have contemplated that prejudice would mean deferring to a "death sentence imposed by a purportedly drug-addled judge." *Id.* at 1083. Petitioners' argument that this Court should rely on the findings of this particular trial judge under such circumstances flies in the face of *Strickland*'s emphasis on the need for confidence in the outcome of a trial that resulted in a conviction and death sentence. *See Strickland*, 466 U.S. at 694.

Second, Petitioners argue that at the post-conviction hearing, the trial judge heard all the mitigating evidence that counsel should have presented at trial. This characterization misstates the evidence presented and is not supported by the record. Petitioners concede that evidence of electroshock treatments and that Respondent had been forced to inhale ammonia fumes was presented in the federal courts but was not before the trial judge during the state-court proceedings. Petition at 6. Such evidence is the type that can have significant mitigating effect. *Cf. Wiggins*, 539 U.S. at 534-35. Petitioners, turning a blind eye to the mitigating evidence not presented to the trial judge, see no need to evaluate prejudice based on the totality of available mitigating evidence, including evidence presented for the first time in federal habeas proceedings. This runs contrary to established law. *See Williams*, 529 U.S. at 397-98 (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)).

The federal-court record also contains information available to sentencing counsel that would have countered the prosecution's use of Respondent's prior conviction for aggravated assault as an aggravating factor. *Cf. Rompilla*, 125 S. Ct. at 2465. Just as counsel has a duty to learn of a capital defendant's social history, counsel also has a duty to learn all he can about any prior conviction the prosecution may rely on as an aggravating factor. *Id.* Respondent's "attorney knew of [the] mitigating factors [relating to the prior conviction] because he had defended the charge. However, he did not present any of this mitigation evidence to the sentencing judge." *Summerlin II*, App. A at A-19. Like the electroshock treatment and ammonia-fumes evidence, this information was not presented to the trial judge either at sentencing or at the post-conviction hearing. Again, Petitioners elect to ignore critical information when they

suggest that the trial judge had before him all the mitigating evidence that trial counsel should have presented.

Accordingly, Petitioners have not made a strong case for granting a writ of certiorari in this case. In its review of Respondent's claim, the court of appeals deployed the correct standard of review, properly incorporating evidence that was presented for the first time in federal court. Petitioners' mere dissatisfaction with the result below cannot justify the creation by this Court of a new standard for evaluating claims of ineffective assistance of counsel, especially when no lower court has passed on the propriety of such a standard. *Strickland* and its progeny are still appropriate for evaluating these claims. Nothing in Petitioners' argument changes that fact.

Furthermore, review of the court of appeals' judgment would have little impact beyond this case. This case does not involve the modified and limited role of federal habeas courts under the AEDPA. *See Woodford v. Visciotti*, 537 U.S. 19, 20 (2002); *Bell v. Cone*, 535 U.S. 685, 693 (2002). This Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), ensures that, going forward, the trial judge will never be the finder of fact both at sentencing and at post-conviction proceedings in capital cases. Under Petitioners' scenario, there would have to arise another case in which the trier of fact heard *all* the mitigating evidence during post-conviction proceedings that trial counsel should have presented at sentencing. *See* Petition at 5-6. Because reviewing the court of appeals' decision would have minimal impact beyond this case, this Court should deny Petitioners' request for a writ of certiorari.

CONCLUSION

This is not a case, as Petitioners claim, in which the trial judge heard *all* of the mitigating evidence at the post-conviction hearing and still concluded that it would not have changed his sentencing decision. Even if it were, *Strickland* provides the proper standard for deciding claims of ineffective assistance of counsel. *Strickland* and its progeny need no revision to accommodate an "especially heightened deference" standard simply because the trial judge has had the occasion to revisit his sentencing decision. The issue presented by Petitioners is so highly fact-intensive that there would be trifling value in this Court's weighing in on the specific and unique facts presented here. Consequently, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Respondent

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No. 05-903

IN THE SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, ET AL.,
PETITIONERS,

-VS-

WARREN WESLEY SUMMERLIN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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ATTORNEY GENERAL

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ATTORNEYS FOR PETITIONERS

[Capital Case]

QUESTION PRESENTED

Did the Ninth Circuit depart from *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that Summerlin was prejudiced by his counsel's performance at the sentencing phase of his trial, when the very judge who sentenced Summerlin subsequently considered the evidence Summerlin now claims should have been presented by counsel and ruled that it would not have changed Summerlin's sentence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATEMENT OF THE CASE

Petitioners rely on the statement of the case set forth in the Petition for Writ of Certiorari.

REASON WHY THE WRIT SHOULD ISSUE

The Ninth Circuit erred in its analysis of the prejudice prong of the test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Summerlin was given an opportunity to develop his ineffective assistance of counsel claim in a state post-conviction proceeding in the state trial court. The same judge who originally sentenced Summerlin conducted an evidentiary hearing and considered the evidence that newly-appointed counsel alleged should have been presented at trial. That same judge found that Summerlin failed to establish a reasonable probability of a different result based on the allegations of counsel's ineffectiveness. The Ninth Circuit erred by not deferring to that finding by the state court.

Summerlin argues that Petitioners are urging this Court to adopt a heightened-deference standard not previously announced in *Strickland* or its progeny. However, Petitioners seek only a straightforward application of *Strickland*. The prejudice prong under *Strickland* turns on whether the alleged deficient performance would have changed the outcome at trial. In the present case, there is clear evidence that Summerlin did not satisfy that prong because the sentencing judge determined that the alleged deficient performance did not affect the sentence imposed.

Even under pre-AEDPA law, a federal court on collateral review was required to accord a presumption of correctness to state court factual determinations fairly supported by the record after a full and fair hearing. *See Sumner v. Mata*, 449 U.S. 539, 549 (1981). Because the state court ruling that the alleged deficient performance did not affect the sentence imposed is essentially a factual finding,

that finding is entitled to a presumption of correctness; thus, under a straightforward *Strickland* analysis, Summerlin's claim fails.

The Ninth Circuit's approach conflicts with that of the Fifth Circuit in a related context. In *May v. Collins*, 955 F.2d 299, 314 (5th Cir. 1992), the court rejected an argument that the state court erred by finding that affidavits from trial witnesses who stated that they had fabricated part of their testimony entitled the defendant to a new trial. 955 F.2d at 303-04. Notwithstanding the fact that there had not been an evidentiary hearing in state court, the Fifth Circuit upheld the district court's ruling, noting that "the judge did not have to make this decision on the cold record alone; rather, he could compare the information presented in the various affidavits against his own firsthand knowledge of the trial." *Id.* at 314. *See also Turner v. Dretke*, 2006 WL 694945 (N.D. Tex.) (citing *May*, and noting significance of fact that "the state habeas judge is the same judge who presided at trial").

Summerlin disagrees with Petitioners' assertion that the trial judge heard essentially all of the mitigation evidence that the Ninth Circuit claimed may have changed the outcome of the sentencing proceeding. (Brief in Opposition, at 5.) Preliminarily, the Ninth Circuit should not have considered the additional mitigation because it was not presented in state court notwithstanding an opportunity to do so in a post-conviction evidentiary hearing. The District Court entered an Order granting Petitioner's Motion to Strike Exhibits setting forth additional mitigation because Summerlin failed to present it in state court notwithstanding a full and fair opportunity to develop the evidence in the state court post-conviction proceeding. (Appendix F, Order dated July 18, 1996, at 7-8.) The Ninth Circuit did not specifically address that aspect of the Order, other than to say that there was "little difference" between what was presented in state court and what was presented in the federal proceeding. *Summerlin v. Stewart*, 267 F.3d 926, 933, 947 (9th Cir. 2001), *withdrawn*, 281 F.3d 836 (9th Cir. 2002).

Of the 13 areas of mitigation evidence cited by the Ninth Circuit as being significant, only allegations that Summerlin received electroshock treatments and had been locked in a room with ammonia fumes was not before the state court when the original sentencing judge ruled that Summerlin had not satisfied the prejudice prong under *Strickland*. Procedural default notwithstanding, because there was "little difference" between what was presented in state and federal court, the additional mitigation considered by the Ninth Circuit would not have changed the state court's analysis of the prejudice prong under *Strickland*.

Because there is essentially no limit on what can be alleged as mitigation, a defendant can always proffer additional mitigation in each successive proceeding. The additional mitigation improperly considered by the Ninth Circuit in this case paled in comparison to the extensive mental health evidence considered and rejected by the state court. The additional mitigation was de minimis, and there was thus no reasoned basis for concluding that Summerlin established a reasonable probability of a different result at sentencing.

The Ninth Circuit's decision ignores the fact that Summerlin was given two opportunities to develop mitigation - at sentencing and again at the post-conviction proceeding. The focus in federal court should be on what was before the trial court at the time of the post-conviction hearing, not what was before the trial court at sentencing. Summerlin is essentially asserting that his post-conviction counsel should have presented more evidence. However, ineffective assistance of post-conviction counsel is not cognizable on federal collateral review. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

The Ninth Circuit's de novo review of the state court ruling renders the state post-conviction proceedings meaningless. States that provide a full and fair opportunity to litigate a post-conviction claim of ineffective assistance of counsel at an evidentiary hearing should not be subjected to de novo federal collateral review of factual

findings made by a state court conducting state post-conviction proceedings.

Summerlin also argues that "[t]he federal-court record also contains information available to sentencing counsel that would have countered the prosecution's use of Respondent's prior conviction for aggravated assault as an aggravating factor." (Brief in Opposition, at 9.) Summerlin does not dispute, however, the existence of the prior conviction. The evidence in question was not compelling enough to persuade a jury not to convict him of aggravated assault and was not presented at the state post-conviction proceeding. The additional evidence was de minimis and does not justify relief in this case.

Finally, Summerlin argues that this case is unique and does not warrant intervention by this court because "going forward, the trial judge will never be the finder of fact both at sentencing and at post-conviction proceedings in capital cases." (*Id.* at 10.) However, Arizona has approximately 80 current death row inmates who have been sentenced by a trial judge and will have been given a post-conviction proceeding before the same judge (if the same judge is available). This Court should ensure that appropriate deference is given to a state court's factual findings on habeas review. Instead of the minimal impact Summerlin claims, a ruling by this Court would have far-reaching impact and ensure that state court judgments, when properly supported by the record, are accorded the deference they deserve.

CONCLUSION

This case is an extreme example of a failure to accord deference to factual findings by a state court. The same judge who sentenced Summerlin also addressed and rejected Summerlin's ineffective assistance of counsel claim, finding that the alleged deficient performance did not affect Summerlin's sentence. Summerlin has not established prejudice under *Strickland*, and this Court should grant the petition for writ of certiorari.

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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Attorney General

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Chief Counsel
Capital Litigation Section
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Attorneys for PETITIONERS

CRM87-0691/124443

APPENDIX F

X FILED ___LODGED
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JUL 18 1996
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN	)	No. CIV-86-0584-PHX-ROS
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
TERRY STEWART, et al.,	)	
	)	
Respondents.	)	
	)	

Respondents have filed a Motion to Strike Petitioner's Exhibits AAAA through HHHH. Petitioner has filed a Response in Opposition to the Motion.

Petitioner's Exhibits AAA through HHHH, submitted in support of the Second Amended Petition for Writ of Habeas Corpus, are the affidavits of Charles Babbitt, H. Allen Gerhardt, David G. Derickson, Richard E. Shafer, Bedford Douglass Jr., Mary Margaret Meyer, Valerie Kvetko, and William Foreman. Respondents argue that because these affidavits were never presented in state court, this Court should not consider them in this habeas proceeding pursuant to Keeney v. Tamaya-Reyes, 504 U.S. 1, 112 S. Ct. 1715 (1992).

A federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

> (1) the merits of a material factual dispute were not resolved in a state court hearing;
>
> (2) the state factual determination is not fairly supported by the record as a whole;
>
> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (4) there is a substantial allegation of newly discovered evidence;
>
> (5) the material facts were not adequately developed at the state court hearing; or
>
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757 (1963). A petitioner is not entitled to an evidentiary hearing if he has failed to develop the facts in state court proceedings, unless he shows cause and prejudice or that a fundamental miscarriage of justice would result if a hearing were not held. Keeney, 504 U.S. at 11, 112 S. Ct. at 1721. Similarly, a petitioner is not entitled to have the federal court consider expansions to the record if he has failed to present the evidence in state court, unless cause and prejudice or a fundamental miscarriage of justice is shown. See Dallas v. Arave, 984 F.2d 292, 296 (9th Cir. 1993); Brown v. Easter, 68 F.3d 1209, 1211 (9th Cir. 1995). This cause-and-prejudice rule applies principally to situations in which a petitioner seeks an evidentiary hearing on the basis of

Townsend's fifth circumstance, Chacon v. Wood, 36 F.3d 1459, 1466 (9th Cir. 1994).[1]

Babbitt, Gerhardt, Douglass, Foreman and Derickson Affidavits

On October 12, 1984, Petitioner filed a petition for post-conviction relief in state court which alleged that the misconduct of his counsel, Maria Regina (now Brandon), and the prosecutor, Vincent Imbordino, violated his Sixth Amendment rights and resulted in prejudice to Petitioner. Petitioner's claim was based on the fact that Regina and Imbordino had a one-night romantic encounter. Petitioner alleged that this created a conflict of interest for Regina and resulted in her improperly allowing him to withdraw from a favorable plea agreement. (Ex. Y, vol. 2: R.O.A. 115 at 3-8.)[2] On January 28, 29, and 30, 1985, the state court held an evidentiary hearing on the petition. Regina and Imbordino testified that on the evening they were together they did not discuss Petitioner's case. (Ex. W: R.T. 1/28/85 at 134-35, 201-02.) Imbordino also testified that after Petitioner withdrew from the plea agreement, Imbordino decided that another plea offer would not be made. (Id. at 195, 204-05.) Substitute defense counsel George Klink testified that it was Petitioner's wish that no more plea offers be accepted. (Id. at 151.)[3]

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1. The availability of an evidentiary hearing under Townsend might be limited by § 104(4)(e)(2) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (codified at 28 U.S.C. § 2254(e)(2)), if the Act applies retroactively to this case. However, the Court need not decide those questions because it finds that Petitioner has failed to meet *Townsend*'s requirements. (*See* discussion *infra*.)

2. "File doc." refers to documents in this Court's file. Exhibits A through Y are the exhibits to Respondents' Notice of filing of State Court Record (file doc. 17) Exhibits AA through ZZ, AAA through MMM, and AAAA through HHHH, are the exhibits submitted by Petitioner in support of his Second Amended Petition (file doc. 106, 107). "R.T." refers to the reporter's transcripts. "M.E." refers to minute entries of the state court.

3. The record also shows that at the initial plea hearing, Judge Derickson informed Petitioner that he could receive the death penalty or life in prison if the went to trial and was found guilty. Petitioner was also told what evidence that state

(continued...)